IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE JURISDICTION

SECOND APPEAL NO. 455 OF 1988

Mahadeo Bhagwan Survase & Ors .. Appellants
(Orig. Defendant)

Vs.

Bhagwant Pandurang Survase .. Respondent.
(Orig. Plaintiff)

Shri. S.D. Thokade, advocate for the Appellant.
Shri N.P. Deshpande, advocate for the Respondents.

CORAM: A.S. OKA, J.
DATE : 23RD JULY, 2004.

P.C. :-

1. On 19.9.88 this court admitted the Second Appeal by recording that ground Nos. 2, 3 and 12 are substantial questions of law. The ground numbers 2, 3 and 12 are as under :

> "2. Whether the lower Appellate Court justified in holding that the document in question viz. Exhibit 28 is a deed of mortgage with condition to repurchase the suit land, whereas a matter of fact, the evidence on record and the recitals of the deed Exh.28 clearly shows that the deed is sale-deed with condition to repurchase within the stipulated

period only.

3. Whether the lower Appellate Court justified in passing a decree in favour of the Plaintiff-Respondent in respect of the land admeasuring. 1H, 24A, which is a decree if granted would contravences the provisions of section 31 (of the Bombay Prevention of Fragmentation and consolidation of Holdings Act, 1947).

12. The lower Appellate Court erred in passing a decree for redemption by wrong interpretation of Section 58(c) of the Transfer of Property Act and the Authorities cited before the Court."

2. From the said order it is apparent that this court was of the opinion that ground numbers 2, 3 and 12 are the substantial questions of law. I have accordingly heard the Learned counsel appearing for the parties on the said substantial questions of law. With a view to appreciate the submissions made by the Counsel appearing for the parties, it is necessary to refer to the facts of the present case. The

Appellants are the original Defendants and the Respondent is the Original Plaintiff. The case of the Plaintiff is that the suit agricultural land is his ancestral property. The Appellant Nos. 1 to 3 are real brothers and the Appellant Nos. 4 and 5 are their sisters. The father of Appellant No.1 to 5 and the Appellant No.6 use to deal in money lending. The case of the Respondent was that in the year 1968, he was in need of some amount and therefore he borrowed a sum of Rs.4,000/- from deceased, Bhagwan, (i.e. the father of Appellant Nos. 1 to 5) and the Appellant No.6. The case of the Respondent is that as the deceased Bhagwan and Appellant No.6 were not having money lending licence, he executed a document of mortgage dated 5th February, 1978 in favour of Bhagwan and deceased Appellant No.6 as security for repayment of loan. It is the case of the Respondent that there was an agreement between the parties by which the Appellants were to take income from the suit land by way of interest. It is the case of the Respondent that at the time of execution of the document he received Rs. 2,000/- and the balance amount was directly paid by the Appellants towards repayment of tagai loan. As per the said document, on his repayment of Rs.4,000/- to deceased Bhagwan

and Appellant No.6, the suit land was to be reconveyed to Respondent. The case of the Respondent is that the sum of Rs. 4,000/- was tendered by him to the Appellants on 4th February, 1978 and the Appellants refused to execute reconveyance. The suit is therefore filed for redemption of mortgage. In the alternative, the Respondent contended that if the Court came to the conclusion that the transaction was absolute sale with stipulation for reconveyance, the decree for specific performance of agreement of reconveyance should be passed.

3. The suit was registered by Appellant No.6 by filing Written Statement. The specific contention of the Appellant No.6 is that the transaction was a absolute sale with an agreement for reconveyance. The Appellant No.6 denied material averments in the plaint. The Written Statement filed by Appellant No.6 was adopted by the Appellant Nos. 1 to 5.

4. The Learned Trial Judge dismissed the suit by holding that the Respondent has failed to prove that the transaction was a mortgage. The Trial Court held that Respondent has proved that on repayment Rs. 4,000/- to Appellant No.6 and Bhagwan, the suit land

was to be reconveyed to him within a period of ten years from the date of execution of document. The Trial Court also held that the suit was barred by principle of waiver by conduct.

5. An appeal was preferred to the District Court by the Respondent-Plaintiff. BY the impugned judgement and decree, the Learned Additional District Judge, Solapur decreed the suit of the Appellant by holding that the document was a conditional sale in the nature of mortgage and that the Respondent was entitled to redeem the mortgage. Being aggrieved by the Judgement and Decree of the Appellate Court, the Appellants/Original Defendant have preferred this Second appeal.

6. Shri. Thokade, the Learned Counsel appearing for the Appellants relied upon the judgement of the Learned Single Judge of this court reported in 1982 Mh.L.J. page 538 (Nana Tukaram Jaikar vs. Sonabai Madhav Saindate and Ors.) and submitted that unless there is evidence to show that the document created relationship of Debtor and Creditor either expressly or by implication, the document cannot be termed as mortgage. He pointed out the recitals made in the

document to the effect that if the stipulated amount was not paid within the fixed period of 10 years, the deed was to be treated as permanent sale deed. He pointed out that it is an indication that the transaction is an absolute sale with a condition of repurchase. He submitted that when a man is in need of money he may either sale his property or may mortgage it. Merely because the seller was in need of money by itself is not sufficient to prove that there was a relationship of Debtor and Creditor between the parties. Learned Counsel also relied upon the judgement of Apex Court reported in AIR 1992 S.C. page 1236 (Tamboli Ramanlal Motilal v. Ghanchi Chimanlal Keshavlal) and submitted that ratio of the said Judgment of the Apex Court was squarely applicable to the facts of this case. He also relied upon the definition of mortgage in the Transfer of Property Act, 1882.

7. The learned Counsel appearing for the Respondent relied upon an admission given by the Appellant No.6 that loan was obtained by the Plaintiff. He submitted that in the cross-examination of the Respondent-Plaintiff, he has stated that the suit land yields an income of Rs.

2,000/- to Rs.3,000/- per year. He submitted that from the said statement made by the Respondent in his cross-examination, it is very clear that the transaction was a mortgage as in the document the price is purpotedly mentioned as Rs.4,000/-. He submitted that the Appellate Court has recorded a finding of fact which requires no interference under Section 100 of the Code of Civil Procedure, 1908 (herein after referred to as "the said Code").

8. I have considered the rival submissions. The Appellate Court has considered the various circumstances which are proved by the evidence on record. The Appellate Court held that the Respondent was badly in need of money in the year 1968 and that the document itself shows that the Respondent was liable to pay sum of Rs. 2,000/- towards Tagai loan. The Appellate Court held that the financial position of the Appellant No.6 and deceased Bhagwan was very sound. The Appellant Court also referred to the area of the suit land and the fact that the Plaintiffs that is, the Appellants were enjoying the income and possession in respect of the suit land for a period of ten years. Considering the evidence on record and the nature of the transaction, the Appellate court

came to the conclusion that there was a relationship of Debtor and Creditor between the parties and that the Appellants were to take the income from the suit land in lieu of interest. Therefore, the Appellate Court recorded a finding that the real transaction was a mortgage by conditional sale.

9. Section 58(c) of the Specific Relief Act reads as under :

> (c) Mortgage by conditional Sale. - Where, the mortgagor ostensibly sells the mortgaged property-
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> on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or
>
> on condition that on such payment being made the sale shall become void.
>
> on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

{Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.}

10. The learned Single Judge of this Court in the case of Nana Tukaram ((supra)) dealt with section 58(c) of the Transfer of Property Act, 1882 (hereinafter referred to the said act of 1882). In paragraph 10 of the said Judgment this Court held that "for construing the deed, reliance was placed upon the judgements of the Supreme Court in Chunchun Jha v. Ebadat Ali and Bhaskar Waman Joshi v. Shrinarayan Rambilas Agarwal. In the former judgement it was held that each such question had to be decided upon its own facts and that the intention of the parties as shown by the document was the determining factor. Prima facie, an absolute conveyance, containing nothing to show that the relation of debtor and creditor was to exist between the parties, did not cease to be an absolute

conveyance and become a mortgage merely because the vendor stipulated that he had a right to repurchase. If the sale and the agreement to repurchase were embodied in separate documents then the transaction could not be a mortgage, whether the documents were contemporaneously executed or not. But the converse did not hold good. If the condition of repurchase was embodied in the document that effected or purported to effect the sale then it was a matter for construction which was meant. In the later judgment the Supreme Court said that the question whether by the incorporation of a condition of a sale a transaction ostensibly of sale could be regarded as a mortgage was one of the intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The definition of a mortgage by conditional sale postulated the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there was no relation of debtor and creditor nor was the price charged upon the property conveyed, but the sale was subject to an obligation to retransfer the property within the period specified. What distinguished the two

transactions was the relationship of debtor and creditor, the transfer being security for the debt". The Apex court in the case of Tamboli Ramanlal Motitlal (supra) also considered similar question. In paragraph numbers 18 and 19 the Apex Court held thus :

> 18. The property is sold conditionally possession is handed over. At the same time, the document proceeds to state "therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right." (emphasis supplied). It is this distinguishing point which has to be borne in mind because an argument was levelled that in Chunchun Jha’s case (AIR 1954 SC 345) (supra), also there was a clause transferring possession. But in this case the enjoyment by the transferee has to be under the ownership right. That makes all the difference.
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> 19. The further clause in the document is to the effect that the executant shall repay the amount within a period of five years and

> in case he fails to repay neither he nor his heirs or legal representatives will have any right to take back the said properties. Here only the right of the transferor is emphasised, while the right of the transferee to foreclose the mortgage is not spoken to. That would be so, if the documents were to be a mortgage by conditional sale. Only in such a case the first condition spoken to under Section 58(c) will come into play. It is well settled in law that the right of redemption and foreclosure are coextensive. The absence of such a right of the mortgagee could only mean that it is a conditional sale".

11. Learned Counsel for the Respondent has relied on Examination chief of the Appellant No.6. He pointed out that in the deposition of the Appellant NO.6 recorded in English it is recorded "The amount of Rs.4,000/- was taken by Plaintiff as loan". He submitted that in view of this admission and in view of the fact that the property was yielding income of Rs.2,000/- to Rs.3,000/- per year and transaction was only in the sum of Rs.4,000/- was sufficient to establish that it was a loan transaction. I also

perused the deposition of Appellant No.6 recorded in Marathi. The word loan does not appear in the marathi version of the deposition and it is recorded that the Plaintiff had taken a sum of Rs.4,000/- for payment of Tagai. The witness has deposed in Marathi language and therefore in normal course, the deposition recorded in Marathi will have to be taken as the original deposition. However, it cannot be ignored that as per the practice followed in mofusil court while the deposition of the witness was recorded by the Court Clerk in Marathi language, the Learned Trial Judge has simultaneously recorded the English translation of the said deposition in his own handwriting. The handwritten version which is obviously in the handwriting of the Learned Trial Judge clearly mentions the following sentences. " The amount of Rs.4,000/- was taken by Plaintiff as loan." As stated earlier, in normal course the Marathi version of the deposition is to be accepted as original. However, in this case the English version is recorded by the Learned Trial Judge in his own handwriting. Even in the paper book prepared by the District Court the same version is printed and there is no attempt made on the part of the Appellants to get the said deposition corrected. In

these peculiar circumstances, the deposition recorded of Appellant No.6 in English will be have treated as correct.

12. Apart from the statement in the said deposition, it is an admitted position that out of consideration of Rs.4,000/-, sum of Rs.2,000/- was paid by the Appellants directly towards repayment of Tagai loan which was payable by the Respondent. As per the Marathi version of the deposition of the Appellant no.6 it becomes clear that the entire amount of Rs.4,000/- was taken by the Respondent for repayment of Tagai loan. All these aspects, leave no doubt that the transaction between the parties was a loan transaction and thus the relationship between the parties was that of Debtor and Creditor. Therefore this is not a case where the only evidence is to the effect that the Respondent Plaintiff was in need of money. There is a positive evidence in the form of admission of Appellant NO.6 that sum of Rs. 4,000/- was taken as loan by the Respondent Plaintiff.

13. In the present case, the Appellants were allowed to take yield from the suit land which was

obviously in lieu of interest. This is a relevant circumstance for determining the real nature of the transaction. In this view of the matter, no fault can be found with the approach of the Appellate Court when a finding of fact was recorded that the real nature of transaction is mortgage by conditional sale.

14. At this stage, the Learned Counsel appearing for the Appellant, Shri Thokade pointed out that the decree passed by the Appellate court is not proper, form and interms of Order 34 Rule 7 of the Code of Civil Procedure, 1908. The said submission appears to be correct. Therefore, the decree passed by the Appellate Court will have to be modified in terms of Order 34 Rule 7.

15. Hence, I pass the following order :

ORDER

The findings recorded by the Appellate court are confirmed. The operative part of the decree passed by the Appellate court is substituted by following :

(a) The suit of the Plaintiff is decreed.

(b) An account shall be taken of the amount due and payable to the Appellants of the amount of principal and interest on the mortgage amount.

(c) After the amount is so determined, the Plaintiff shall deposit in the court the said amount together with costs if any fixed under rule 10 of order XXXIV of the Code of Civil Procedure, 1908 within a period of six months from the date on which the account taken as per the earlier part of the decree is confirmed by the court.

(d) On deposit of the said amount by the Plaintiff in the stipulated period, the Respondent Plaintiff will be entitled to re-transfer of the suit land with possession thereof and for delivery of documents by making necessary application for final decree.

(e) In case the Plaintiff fails to pay the amounts as specified in paragraph no. (c)

above within the stipulated period, the Plaintiff will be debarred from all rights to redeem the property.

(e) There will be no orders as to costs.

sd/-

JUDGE